



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 6, 2004

Ms. Jennifer Soldano
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2004-3711

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 200924.

The Texas Department of Transportation (the "department") received a request for "the file containing the job applications, screening instrument (with scores), interview questions etc. for Job Number 004870." You claim that the submitted information is excepted from disclosure under sections 552.101, 552.117, 552.122, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

You assert that the interview questions, candidate answers, and preferred answers in Exhibit B are excepted from disclosure under section 552.122 of the Government Code. Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). Traditionally, this office has applied section 552.122

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This ruling does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Additionally, when answers to test questions might reveal the questions themselves, the answers may be withheld under section 552.122(b). *See* Open Records Decision No. 626 at 8 (1994).

Upon review, we agree some of the information in Exhibit B constitutes "test items" as contemplated by section 552.122(b). Accordingly, the department may withhold the information we have marked pursuant to section 552.122(b). We find, however, that the remaining interview questions and answers in Exhibit B do not test an individual's or group's knowledge or ability in a particular area, and are therefore not excepted under section 552.122(b).

You assert that portions of Exhibit C are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely elect to keep this information confidential pursuant to section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold the information you have marked in Exhibit C under section 552.117(a)(1) on behalf of current or former officials or employees who elected to keep the information confidential pursuant to section 552.024 prior to the date on which the department received the present request for information. The department may not withhold this information under section 552.117(a)(1) for those employees who did not make a timely election to keep the information confidential.

If a timely election was not made, we note that a social security number must be withheld in some circumstances under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You inform us that the department obtains employees' social security numbers pursuant to provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 653a(a)(2)(B), (b)(1)(A). Under this federal law, an employer is required to furnish a report that includes the employee's social security number to the Directory of New Hires of the state in which a newly hired employee works. 42 U.S.C. § 653a(b)(1)(A). Thus, we agree that the department must withhold the social security number of a department employee whose number was collected pursuant to this law under section 552.101. For an employee who was hired before this law was enacted,

the social security number was not obtained or maintained pursuant to the law and therefore, those numbers may not be withheld under section 552.101 and the federal law.²

You assert that portions of Exhibit C are subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information relating to a Texas driver's license. Gov't Code § 552.130. The department must withhold the Texas driver's license information you have marked under section 552.130.

You assert that a portion of Exhibit C is excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

²Although you also note that section 158.203 of the Family Code constitutes a statute enacted after October 1, 1990 that requires the collection of certain employees' social security numbers, you have not argued that this provision of law is in fact applicable in this instance. Accordingly, we do not address the applicability of section 158.203 in this instance.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the relevant members of the public have affirmatively consented to the release of the e-mail addresses. We note, however, that section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body, a website address, or the general e-mail address of a business. E-mail addresses within the scope of section 552.137(c) are also not excepted from disclosure under section 552.137. We determine that the e-mail address you have marked in Exhibit C is within the scope of section 552.137(a). Unless the department has received affirmative consent to disclose the e-mail address, the department must withhold the marked e-mail address under section 552.137 of the Government Code.

In summary, the department may withhold the information we have marked in Exhibit B under section 552.122. The department must withhold the information you have marked in Exhibit C under sections 552.130 and 552.137. The department may be required to withhold the information you have marked in Exhibit C under section 552.117. A social security number that is not subject to section 552.117 may be confidential under federal law. The remaining submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Amy D. Peterson
Assistant Attorney General
Open Records Division

ADP/sdk

Ref: ID# 200924

Enc. Submitted documents

c: Mr. Bernie L. Holder
738 County Road 1525
Ector, Texas 75439
(w/o enclosures)